



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI

INDUSTRIAL CAUSE NO. 37 OF 2012

JOSEPH NJOROGE KIAMA.....CLAIMANT

VERSUS

SUMMER LTD.RESPONDENT

JUDGMENT

1. The claimant in this suit avers that he was an employee of the respondent having been hired from November 2003, initially as a casual worker and later as a heavy commercial truck driver.
- 2.
3. According to him he worked until 10th September, 2011 when he was verbally terminated by the respondent As a consequence the claimant seeks an award from this court for Kshs.577,260/25 itemized under paragraph 10 of his memorandum of claim as follows:
- 4.

(i) Unpaid salary since September, 2011 to date.

(ii) Termination gratuity for 8 years worked.

(iii) One month's salary in lieu of notice.

(iv) Salary underpayments for the period worked.

i. **House allowance.**

ii.

i. **Annual leave, public holiday worked, off days worked, uniform compensation for seven years and overtime for the whole period.**

1. Except for item number (iv), all items were specified totalling to Kshs. 577,260/25.
- 2.
3. The respondent on the other hand does not deny the claimant was its employee. The respondent however avers that the claimant absconded from duty and was never terminated by the respondent. According to the respondent, the claimant absconded under circumstances suggesting he had committed a criminal offence.
- 4.
5. The respondent admitted there were attempts to resolve the issue through the claimant's Union but avers that it gave appropriate response as to why it could not honour the claimant's claim.
- 6.
7. During the trial the claimant stated that he was an employee of the respondent and that he was initially hired as a casual worker and later as a driver. He entered payroll in 2005 which according

- to him was the year he assumed permanent employee status and worked until 10th September, 2011 when he was verbally terminated from employment.
- 8.
 9. It was his evidence that on the previous day to the day he was dismissed, he left his lorry at the parking and was asked by the turn boy to report the following day to transport some goods to Embu.
 - 10.
 11. According to him he reported to work at 5 a.m as advised by the turn boy and left for Embu arriving there at 8 a.m.
 - 12.
 13. It was his testimony that his work was to drive the truck and that it was the turn boy who had access to the back cabin of the lorry. He stated that on the material day he off-loaded the goods and returned the lorry to a place called "returns". He stated that he had no idea what was being returned. According to him, he parked the lorry and went for lunch but when he returned, he was asked if any goods were lost on the way to Embu and he stated that he never stopped anywhere on the way to Embu. Thereafter he claims to have been told to leave and go to a "place he knows".
 - 14.
 15. He therefore complained to his Union who followed up the matter on his behalf but the follow up was unsuccessful hence he decided to seek legal advice.
 - 16.
 17. He denied absconding duty insisting he was refused entry to the respondent's premises. He further denied knowledge of any lost sugar and said he had nothing to do with it.
 18. It was his evidence that upon termination, he came to learn that he was being underpaid and that the respondent never offered any house allowance.
 - 19.
 20. In cross-examination by counsel for the respondent, the claimant stated that there was in existence a CBA between his Union and the respondent and that he did not respond to the respondent's lawyer's letter accusing him of absconding duty.
1. The respondent for its part called two witnesses. DW1 testified that the claimant worked for him for 3 years prior to termination. It was his evidence that he sent him to Embu together with the turn boy to deliver sugar but upon delivery, some sugar was detected as underweight. He stated that no sugar spilled in the truck and that there were holes in the sacks and that the claimant on noticing went away and never came back until one and half months when he received a letter from the claimant's Union.
 - 2.
 3. It was his evidence that the turn boy who was with the claimant apologized over the incident and was allowed to continue working.
 - 4.
 5. In cross-examination, DW1 stated that he sent the claimant together with the turn boy to Embu and that the claimant as the driver was supposed to supervise that the loading and unloading was done properly. He admitted that siphoning of sugar was a criminal offence however he elected not to report the issue to the police. It was his evidence that only the turn boy wrote an apology letter and was allowed to continue working while the claimant went to the Union who demanded payment of his terminal dues. He denied terminating the claimant's services and that it was the claimant who absconded work. He testified that the claimant left the day sugar was found to be underweight.
 - 6.
 7. DW2 testified that he worked for the respondent as an assistant loader. It was his evidence that on the material day he loaded 200 bags for sugar to be transported to Embu. When they got to Embu they off loaded the sugar but 17 bags were found to be underweight. They were asked to return the underweight bags to Nyeri.
 - 8.
 9. On arrival at Nyeri they were asked to admit responsibility for tampering with the 17 bags and they would be forgiven. He admitted that they tampered with the bags and for this he apologized in writing and was allowed to continue working. The driver on the other hand went away and

- never reported back to work.
- 10.
 11. In cross-examination he said the driver was not around when the bags were initially loaded and that on their way to Embu they stopped the vehicle and siphoned the sugar.
 - 12.
 13. The claimant's counsel, Mr. Kimunya in his written submissions reiterated the facts as pleaded and testified in evidence by the claimant. He submitted that the claimant was the respondent's employee from November, 2003 to September, 2011 and during this period, the respondent paid the claimant below minimum wage. He further submitted that the respondent never paid the claimant house allowance.
 - 14.
 15. Regarding the issue whether the claimant was unfairly terminated or not, counsel submitted that the claimant was no longer in the respondent's employment and that on 10th September, 2011 he was told to go away after the sugar incident. Thereafter he kept checking but was kept away. Regarding the apology, counsel submitted the same was written when the DW2 was hired by the respondent after the filing of the instant case and backdated. Concerning the issue of absconding work, counsel wondered why the respondent did not sack the claimant if indeed it was true he absconded work.
 - 16.
 17. The respondent's counsel Mr. Ng'ang'a for his part submitted that claimant confirmed that he was the one who delivered sugar to Summer Merchandiser Ltd., Embu. Counsel relied on the testimony of DW2 who stated that the siphoning of the sugar was done with the knowledge of the claimant. This according to counsel was gross misconduct for which the respondent could have dismissed the claimant and DW2 summarily but the respondent instead was ready to accept apology from the culprits, namely the claimant and DW2 and only the latter apologized and continued working while the claimant failed to do so.
 - 18.
 19. Counsel further submitted that the claimant having failed to specifically plead and prove that his monthly payment as at September, 2011 the court ought not make any such award since it was in nature special damages.
 - 20.
 21. The issue which the court needs to determine in this dispute is whether the claimant's services were terminated by the respondent or he absconded duty. If the court came to the conclusion that the claimant absconded duty, then his claim against the respondent would not lie. If on the other hand the court comes to the conclusion that he was terminated and such termination was unlawfully and unfairly carried out then the court can proceed and assess damages.
 - 22.
 23. The claimant in his pleadings avers that he has never been formally terminated and claims salary for 14 months from September, 2011. On the other hand, he claims to have been verbally terminated by the respondent.
 - 24.
 25. The letters from the claimant's Union addressed to the respondent talk of verbal termination of the claimant's services. It would therefore seem from the claimant's view point that his services were terminated albeit verbally. An employment contract can be oral or written hence its termination can equally be oral or in writing. Provided parties are unequivocal about the end of their relationship.
 - 26.
 27. The respondent for its part maintains that it did not terminate the claimant's services. It was their position that the claimant absconded from work after the sugar incident. This position was clearly stated in the letter of 17th September, 2012 attached to the claimant's memorandum of claim.
 - 28.
 29. The claimant's lack of consistency on whether his services were terminated in September, 2011 after the sugar incident or he still regarded himself as an employee of the respondent tend to lend credence to the respondent's claim that it did not terminate the services of the claimant but rather it was the claimant who absconded work after the sugar incident.
 - 30.

31. The claimant in his evidence testified that his work was to drive the truck and that he had nothing to do with the loading. While this may be so, DW2 testified that on their way to Embu, he sat in the same cabin as the claimant and that the claimant stopped the vehicle at some point in order for him (DW2) to go to the back cabin and siphon sugar. This portion of the evidence was not sufficiently resisted by the claimant. Besides on his letters of demand he never attempted to raise the issue nor exonerate himself from the incident which DW2 had implicated him in.
- 32.
33. At common law, one of the essential ingredients of employer-employee relationship is trust. It is a breach of the trust embedded in the relationship for any party to act or omit to act during the continuance of that relationship, in a manner that betrays the trust. To this extent the court does not agree with the claimant's claim that he was verbally terminated by the respondent. It is more probable that he kept off work fearing the action the respondent might take as a result of the sugar incident. This conclusion reached by court is further supported by lack of consistency on the part of the claimant whether he considered his services terminated after the sugar incident or he still regarded himself as an employee of the respondent as averred in his pleadings before the court.
- 34.
35. If indeed he still considered himself as an employee of the respondent no evidence was led or tendered to show any attempt to resume work and a corresponding refusal by the respondent.
- 36.
37. The respondent has maintained that the claimant absconded from work. He has consistently denied terminating the claimant's services over the sugar incident and raised as a defence that despite its right to terminate the services of the claimant and DW2, it instead demanded of an apology over the incident as a precondition to resuming duties which DW2 acceded to, but the claimant did not.
- 38.
39. The issue that remains unclear to the court is how the respondent came to the conclusion that the claimant absconded from work.
40. Although the law does not prescribe a specific period an employer must wait to deem the employee to have absconded, the employee ought to have left the place of work and does not appear to have any intention of returning to the workplace. Generally the employee has an obligation to inform the employer of any reason why he or she is unable to be at work. For instance illness or having to attend to a family crisis. Where the employee does not contact the employer, the employer has an obligation to try to contact the employee. The purpose is to warn the employee of the possible consequences of not being at work without permission. This obligation on the part of the employer is however not a rule of law but is out of best practice and the broader principle of fair labour practice. Since an employee may not be able to contact an employer as soon as practicable under certain circumstances such as where such employee may be sick or injured and is unconscious in hospital.
- 1.
41. Section 44(4)(b) of the Employment Act permits an employer to summarily dismiss an employee if without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.
- 42.
43. Although the court has noted earlier in this judgment that the claimant failed to demonstrate clarity of mind on whether he considered himself terminated by the respondent or was still its employee and whereas the claimant neither averred nor led any evidence or attempt to resume work, the letter dated 21st September, 2011 just about ten days after the sugar incident clearly showed that the claimant had no intention of returning to work since in that letter he considered his services terminated and called on the respondent to pay his terminal dues. To this extent there may not have been any obligation on the part of the respondent to proceed further in seeking to find out why the claimant was absent from work as the letter of 21st September, 2011 spoke for itself.
- 44.
45. Absence from work for ten days without permission entitled the respondent to summarily dismiss

- the claimant from work as provided under Section 44(4) of the Employment Act.
- 46.
47. The court therefore reaches the conclusion that the claimant absconded duties and his services became summarily terminated by operation of law on the 21st of September, 2011 when he demanded payment of his terminal dues thereby evincing his intention not to return to the respondent's employment.
- 48.
49. Concerning the issue of underpayment of wages, it was the evidence of the claimant that he worked for the respondent initially as a casual employee and later became a long term employee in 2006. This position has been confirmed by his payslips which he annexed in support of the claim. The payslips commence from July, 2006 and in absence of any evidence to the contrary and considering the burden of proof lies with the claimant, the court will assume July, 2006 as the commencement date of the claimant's long-term employment.
- 50.
51. The ruling wage order during this period was the one which was issued vide L.N. 38 of 2006. According to this wage order, the claimant who was a heavy commercial truck driver was supposed to earn Kshs.11,031. His payslip however shows he was being paid Kshs.9,451 this is a shortfall of Kshs.1,580. This wage order applied until June, 2009 when a new one was issued which revised the minimum wage to Kshs.13,017. According to the attached payslips the claimant was earning Kshs.12,500 per month creating a shortfall of Kshs.517 per month. The wage order was revised once more in 2010 and placed minimum wage for the claimant category at Kshs.14,319 yet the claimant was actually being paid Kshs.12,500 leaving a shortfall of Kshs.1,819. In 2011 May, the wage order was once more revised to Kshs.16,109 while the claimant then was being paid Kshs.14,500 creating a shortfall of Kshs.1,609.
- 52.
53. Payment of statutory minimum wage is obligatory and is a minimum right of a worker regardless of whether he is dismissed summarily or not. From the foregoing it is clear that the respondent was paying the claimant below recommended minimum wage. To this extent the court awards the claimant as follows:
1.

<u>Kshs.</u>	
2. (i) July, 2006 – May, 2009.	1,509 per month
3.	
4. (ii) June, 2009 – May, 2010	517 per month
5.	
6. (iii) June, 2010 – May, 2011	1,819 per month
7.	
8. (iv) June, 2011 – August, 2011	1,609 per month
9.	
10. (v) 10 days salary in September, 2011 at the ruling minimum	
11. wage.	
12.	
54. Concerning house allowance, no evidence was tendered or led by the respondent to show the claimant was either being paid house allowance or the consolidated salary inclusive of house allowance. Payment of house allowance is a matter of law as provided under section 31(1) of the Employment Act. In absence of evidence to the contrary the practice by this court has been to award it as 15% of the basic pay. To this extent the court awards the claimant 15% of the ruling minimum wage per month from July, 2006 to September, 2011 when he was terminated.
- 55.
56. The claims for unpaid salary since September, 2011, termination gratuity, one month salary in lieu of notice, annual leave and public holidays have failed for reasons advanced earlier in the judgment and further for lack of evidence or sufficient evidence and are hereby dismissed.
- 57.
58. In conclusion the court awards the claimant as follows:
- 59.

(i) Kshs.89,642 on account of difference between statutory minimum wage and wages actually paid to the claimant for the period he worked for the respondent.

(ii) Kshs.87,894 on account of house allowance for the period he worked for the respondent.

(iii) Costs of the suit.

1. This award shall be subject to relevant taxes and statutory deductions.

1. It is so ordered.

2.

3. **Dated at Nyeri this 21st day of March 2014.**

4.

ABUODHA N. J

JUDGE

Delivered in open Court in the presence ofAdvocate for the Claimant and in the presence ofAdvocate for the Respondent.

ABUODHA N. J.

JUDGE